

CONTINUING CHALLENGES FOR SMALL CONTRACTORS

HEARING BEFORE THE SUBCOMMITTEE ON CONTRACTING AND WORKFORCE OF THE COMMITTEE ON SMALL BUSINESS UNITED STATES HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS FIRST SESSION

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Questions for the Record:	
None.	
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None.	
Additional Material for the Record:	
None.	

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WEDNESDAY, NOVEMBER 18, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee] presiding.

Present: Representatives Hanna, Gibson, Velázquez, and Lawrence.

Chairman HANNA. Thank you all for being here. We will call this meeting to order.

There is an old adage in business that you cannot manage what you do not measure. The very active tracking often drives behavior. However, today, we are here to talk about what happens when measurements are distorted or ignored? In the realm of federal contracting, it usually means small business suffers. For example, when you look at small business goals, the SBA grades results. However, what SBA reports is not what we told it to measure. Congress created a goal of 23 percent of prime contracts to small businesses each year, and the SBA reports that it exceeded that goal for the last 2 years. Unfortunately, the truth is that the federal government excludes nearly 20 percent of its contracts before it figures out whether or not it met its goals. Kind of strange, is it not?

Due to the way SBA counts the exclusions, some agencies are not required to do much for small businesses. Agencies, like the Department of Transportation, report that over 45 percent of their contracts went to small businesses, but in reality, it was only 13 percent because DOT excludes 72 percent of its contracts as unsuitable for awards to small businesses. The General Service Administration, an agency that has procurement as its mission, reported that 40 percent of contracts went to small businesses, but the truth is only 17 percent went to small business firms because the GSA thinks that 44 percent of its contracts count. This fuzzy math costs small businesses around 11 billion bucks a year.

Likewise, when it comes to subcontracting, the Small Business Act requires that large prime contractor businesses must negotiate goals for using small subcontractors. However, the last time a company suffered a penalty from this, if you can believe it, was 1982. Indeed, SBA lowered the subcontracting goal again last year but agencies are still missing the goal. The Subcontracting Achievement Report does not even provide dollars, although this informa-

tion has been required since the 1970s. Many large contractors do not even bother submitting reports about their subcontracting activities. All of this sends a message that while Congress may want small businesses to thrive and succeed, the Executive branch has not followed the law or measured the results. What we measure and the time we recognize the contributions small businesses both as prime and subcontractors make to the economy, they increase competition, increase innovation, create jobs, and save taxpayers' dollars.

As this Subcommittee considers the issues surrounding small businesses and federal contracting, we want to learn today how we can ensure we are using the right metrics and getting complete data. If we succeed at that goal, we will help small businesses compete, create jobs, and save taxpayers money.

I want to thank our witnesses for participating today, which will help us achieve those ends.

Now, I yield to Ranking Member Velázquez, for her opening remarks.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman. It is my pleasure to again be filling in for Mr. Takai.

In fiscal year 2014, the federal government spent more than \$440 billion on the purchase of goods and services netted for its day-to-day operations. As such, the U.S. government remains a consistent and reliable client, which attracts small businesses looking to enter the federal marketplace by becoming either prime contractors or subcontractors. We have seen some success in ensuring that small businesses receive their fair share of these contracting dollars.

Last year, small primes received over \$90 billion, amounting for almost 25 percent of contracting dollars. By this measure, the government has once again met its small business contracting goal. However, when taking a closer look at the data, not all is as it appears. It seems that a lack of transparency in the reporting of these numbers is skewing the results. For example, billions of dollars continue to be excluded from the Small Business Goaling Reports. In fiscal year 2014, \$80 billion, nearly 20 percent, was deemed not eligible for small businesses, and as a result, not included in the base of calculating the small business goal.

While some of these contracts have been set aside for other groups, there are those that argue that small businesses are incapable of performing some of these contracts. This is just not the case. The capabilities of small businesses continue to grow, and we have seen many instances in which small businesses were awarded these contracts even without the use of set-aside procedures. Additionally, there is no statutory language that exempts these contracts from being included in the calculation of the goals.

Unfortunately, the lack of transparency does not end there. At an earlier hearing, we heard allegations that one agency has been underreporting its contracting dollars by \$6 to \$10 billion for the past 5 years. Also, we continue to see large companies among those listed as receiving small business contracting dollars. SBA cannot continue to claim that 23 percent of prime contracting dollars have been awarded to small businesses if the data being used to arrive at that conclusion is incomplete and inaccurate.

However, prime contracting is only one part of the equation to becoming successful in the federal marketplace. Before becoming prime contractors, many small businesses first enter the marketplace as subcontractors, yet we continually hear how difficult it has become for firms to get subcontracts as prime contractors are doing more of the work themselves.

Our supply chain needs a robust and varied source of subcontractors. Not only do they allow for more specialized businesses, but subcontracting allows for the benefit of these contracts to flow further into communities, creating more jobs and increasing economic development. For these reason and many more, we need to make sure that prime contractors are fully utilizing small businesses as subcontractors to the maximum extent possible.

You have heard us say time and time again that a small business contract creates a win-win situation for both the business itself and the federal government. Competition is good, and that is one of the fundamental principles of our system. I hope that today's hearing will allow us to get some insight as to how we can create more of these win-win situations and ensure that small businesses are getting their fair share of federal contracts.

I want to thank all of the witnesses for being here today, and I yield back the balance of my time.

Mr. Chairman, I just would like to share with the members of the panel that I am filling in for Mr. Takai, who is the ranking on this subcommittee, but he is absent, and so I am here making this opening statement, but I have to go to my other hearing of the Financial Services Committee, where chairwoman of the SEC is testifying, and I have legislation that is very important, and I would like to ask her some questions, so I will have to excuse myself.

Chairman HANNA. Thank you.

Ms. VELAZQUEZ. Thank you.

Chairman HANNA. Do you have something to say? Go ahead, please.

Ms. VELÁZQUEZ. It is my pleasure to introduce Ms. Karen Ward. Ms. Ward is the president of Ward ENG Support Services, an economically disadvantaged, women-owned business located in Leesburg, Virginia. The company specializes in system engineering, cyber security, and information assurance, as well as program management. Ms. Ward has a Master of Science in Software Engineering and is a doctoral candidate of Engineering. Ms. Ward is also here testifying on behalf of the U.S. Women's Chamber of Commerce, an organization that represents 500,000 members, three-quarters of whom are small business owners and federal contractors. Welcome, and thank you for being here.

Chairman HANNA. Thank you.

Our first witness today is Ms. Anne Crossman, who is the Head Revolutionary with Completed Systems in Oakton, Virginia. Completed Systems is a software development Ms. Crossman founded in 1996. She is testifying on behalf of Women Impacting Public Policy. Thank you for being here.

Our second witness is Mr. Edward DeLisle, partner and co-chair of the Federal Contracting Group at Cohen Seglias Pallas Greenhall and Furman—a lot of people—in Philadelphia, Pennsylvania, where he consults clients in all aspects of small business

procurement. He is testifying on behalf of the Association of General Contractors of America.

Our third witness is Michael Janeway. Mr. Janeway is the founding member and president of APG Technologies, LLC, a service-disabled, veteran-owned small business headquartered in Sterling, Virginia.

Thank you all for being here.

Ms. Crossman, you may begin.

You know how the lights work.

Ms. CROSSMAN. I am working on it.

Chairman HANNA. You have 5 minutes and the light will go on and that will tell you when you have—that is a 1 minute warning, but we want to hear what you have to say, so you may begin. And stay relaxed.

STATEMENTS OF ANNE CROSSMAN, HEAD REVOLUTIONARY, COMPLETED SYSTEMS; EDWARD T. DELISLE, PARTNER AND CO-CHAIR, FEDERAL CONTRACTING GROUP, COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC; MICHAEL D. JANEWAY, PRESIDENT AND CEO, APG TECHNOLOGIES, LLC; KAREN WARD, PRESIDENT AND CEO, WESSGRP

STATEMENT OF ANNE CROSSMAN

Ms. CROSSMAN. Thank you very much. Good morning, Chair Hanna and distinguished members of the Subcommittee. My name is Anne Crossman. I am the head revolutionary at the Completed Systems, a women-owned small business based in Leesburg, Virginia. Our company is dedicated to completing information technology projects that others have given up on. I am also president of Vertical Jobs, a company that provides experienced role players to law enforcement and government agencies. I am here today representing Women Impacting Public Policy, where I serve on its Leadership Advisory Council. WIPP plays a key role in developing women-owned businesses and its successful federal government contractors through its Give Me 5 and ChallengeHER programs.

On a personal note, clarity of teaming relationships and the length of time between an RFP and an award, are continuing challenges. Thankfully, under the Committee's leadership, the Congress has enacted much needed changes for small contractors. While the federal government has yet to reach its 5 percent goal of prime contracts awarded to women, the size of the WOSB procurement program has tripled since 2011. In 2011, WIPP testified before this Subcommittee on subcontracting issues. Since that time, the Committee has made a number of improvements that we applaud, including allowing women-owned small businesses to better partner with one another on federal contracts. In addition, the Committee's efforts to increase accountability for agencies to meet their subcontracting goals and incorporation of subcontracting goals for DoD are much appreciated. In reviewing our past testimony before this Committee on barriers facing women business owners in the federal market, we identified two continuing challenges, subcontracting plan issues, and data transparency. Many of the problems faced by subcontractors are symptoms of the under-

lying issue that the subcontractors have no real relationship with the federal government.

In 2011, we raised several questions about subcontracting plans. How are they reviewed prior to award? How are they enforced? Should subcontractors have access to the plans? WIPP members tell us that many of these questions have not yet been addressed. We continue to believe that prime should adhere to an "if you list us, use us" policy.

With respect to data transparency, GAO has found issues with the collection and availability of subcontracting data. It seems to us that using four systems to report disparate data is inefficient.

Data issues, however, are not limited to only subcontracting plans. The annual scorecard should be accurate given the roles these reports play in encouraging agencies to contract with small businesses. We offer three suggestions. First, the data reported in the scorecard needs to be accurate. The SBA OIG found widespread misreporting by agencies. Second, the scorecard should measure the entirety of federal spending. Exclusions from the score card significantly change goal achievement progress.

Third, reporting the number of firms winning contracts, not just the total dollar amount would enhance the scorecard. While the amount awarded to small businesses is increasing, there are fewer firms participating in these contracts.

In conclusion, women entrepreneurs consider the federal marketplace a key opportunity to grow their businesses. For many, subcontracting is a staple of their federal business. Ensuring that the rules governing federal contracting are accurate and fair is of paramount importance to their success.

Thank you for the opportunity to testify, and I would be happy to answer any questions that you may have.

Chairman HANNA. Thank you.

Mr. DeLisle?

STATEMENT OF EDWARD T. DELISLE

Mr. DELISLE. Yes. Thank you, Chairman Hanna, for inviting me to speak before the Committee today about a number of very important issues that are confronting small business today. What I am going to do is stress two points during my oral testimony this morning. The first pertains to transparency in federal small business contracting, and the second pertains to the change order and the claims process that small business construction contractors in the federal marketplace are having a more and more difficult time navigating based upon how that process or those processes are being administered by the federal government, because you see, the difficult part of being a small contractor does not end with the procurement process, the solicitation process. It continues after project award. And so I will speak about some of those issues as well.

With respect to transparency, the issue is, how well is the federal government providing access to opportunities for small business? And are these opportunities placing small businesses in a position to succeed and thrive? In order to answer those critical questions, there has to be an understanding as to where contracting opportunities are presenting themselves for small business as part of the contracting continuum, which there are many layers in the con-

struction industry. Prime contractor, subcontractor, and various different levels. Where are subcontractors being provided those opportunities, and what percentage of federal government contracts are, in fact, they getting?

Well, that is where transparency in the reporting issue all come into play, and this Committee has played a leading role in attempting to increase transparency and generate the data necessary to answer the questions that I just posed a few moments ago. And the scorecards which have been mentioned are a good first step in determining exactly how small businesses benefitting from the programs that do exist currently with the federal government. AGC thanks the Committee for its efforts up until this point and asks for the Committee's help in seeing another important initiative come to fruition.

On December 26, 2013, the President signed the National Defense Authorization Act of 2014, and section 1614 of the Act calls for reporting and counting of lower tiered small business subcontractors towards the fulfillment of small business contracting goals. Under the old system, only small businesses at the first tier or subcontracting level are reported and counted towards obtaining small business goals for any given contract and, in fact, we are still operating under that old system now. Under the new system, the idea is to provide a more in-depth analysis and understanding of how and how many small businesses are benefitting from any given contract. Under the old system, you do not get that.

Why have we not seen the new law go into effect? Well, it because of the rulemaking process. The SBA and FARC Council are still in the rulemaking process. Under the law when it was initiated, when it was signed, they had 18 months to complete the rulemaking process. We are not there yet. We are 23 months out. And while we have a proposed rule from the SBA to implement the new law, we are just not there yet, which is affecting the ability to understand even how small business is being impacted all through the contracting continuum. So from AGC's standpoint, we would urge the Committee to push the SBA and FARC Council to complete the rulemaking processes so that this important initiative can be put into effect.

Now, with respect to change orders and claims, once a small business contractor gets through the initial process of obtaining a contract, it does not end there. Changes happen on federal contracts all the time. Government needs change, conditions from a construction contractor's standpoint in the field may change, and work becomes more expensive, and additional time may be needed to complete whatever work might be required under a given contract.

Small businesses can adapt and adjust to changes like that. However, the processes for dealing with changes need to be fair, and the process needs to be timely. Unfortunately, many times it is unfair and untimely, and there is no better example than the VA's project in Aurora, Colorado, about which I have a lot of experience. I had a client on that particular project who had an \$18 million renovation job on an existing facility, and it cost \$32 million to complete. The change order process never took place, forced this contractor to submit claims, prolonged the process, and but for luck

and circumstance, my client would have been out of business. And there are many small businesses that are in exactly that same boat.

We, at AGC, encourage this Committee to investigate issues like those, the change order and claims process, and AGC is committed to working with the Committee as part of any investigative process that it deems appropriate.

Chairman HANNA. Thank you.

Mr. Janeway?

STATEMENT OF MICHAEL D. JANEWAY

Mr. JANEWAY. Good morning, Chairman Hanna and the members of the Committee. I would like to thank you for inviting me to testify today to discuss the continuing challenges facing small contractors, and specifically, how the federal government has not met its subcontracting goal in 5 years.

My name is Mike Janeway, and I am the founding member and president and CEO of a small business called APG Technologies, LLC, located in Potomac Falls, Virginia. My expertise in this matter is as a private business owner, a board committee member of several professional associations, and a retired Air Force lieutenant colonel with defense acquisition experience on large ACAT 1 programs.

I founded APG Technologies in March 2008, as a service-disabled, veteran-owned small business, with a goal of providing high value ROI data management designs and solutions to the Department of Defense and various intelligence agencies. We have about 30 employees located in multiple states where we have successfully delivered programs used in the War on Terror. We maintain an excellent reputation and have grown slow but steady, and are known as a niche provider of high-value, secure data management solutions.

Since our deliverables are typically a component of a large overall development, most of our revenue comes from being a subcontractor. The last 3 or 4 years have been extremely challenging, especially for small businesses. We have seen the impacts of sequestration, delays in acquisition cycles, contracts canceled, short duration purchase orders for 4 to 6 weeks at a time, contracts combined into large purchase agreements, turmoil in our large partners as they merge and spinoff business units, and an acquisition with poor to nonexistent communications and an overriding focus on low price awards. The results of this have driven many small businesses out of business. And while I do not have the numbers, I had a senior SBA executive tell me at a recent event they have seen large and dramatic number drops in the number of small business supporting federal.

Adding to all this is the talent flight we are starting to see from employees who leave federal for commercial. In the words of a former employee, "It is just too unstable, and I do not see a future in federal." While this may seem overly dark, when you are in a small business and you make your living off subcontracts, it seems that way at times because you are at the bottom of a somewhat unstable and even dark chain, it seems.

The government requires federal contractors to submit a small business subcontracting plan that outlines how they will meet the subcontracting business goals. Since the goals are administrative rather than statutory, there is a lot of flexibility in execution, and most of the time the goals are not met. Too often we see subcontracting plans written to adjust proposal goals with little to no follow-through after the prime contract is awarded. With no enforcement by the federal government to hold contractors accountable, the subcontracting plan seldom matches reality and goals are seldom met.

APG Technologies has experienced this where we entered into a team agreement in good faith with a large defense integrator. We took engineering talent off billable gigs to write the solutions and proposals, and then were not awarded the contract afterwards for some convenient reason. That is not an uncommon story with a lot of small companies out there. Setting statutory subcontracting goals to be followed by all federal agencies are the key to establishing a degree of stability for small businesses. Without these measures, the federal government will continue to fail in meeting its small business subcontracting goals. I believe the solutions should be statutory, and government contracting officers need the authority and ability to enforce them. Subcontracting plans should no longer just be words on a paper; it should be an enforceable and executable management plan to address the statutory requirement that reflects the government's desire for a healthy and vibrant small business community.

Mr. Chairman, thank you for the opportunity. I will be glad to answer any questions you have.

Chairman HANNA. Thank you.

Ms. Ward?

STATEMENT OF KAREN WARD

Ms. WARD. Chairman Hanna, Ranking Member Velázquez, members of the Committee, thank you for this opportunity to provide this testimony. I am Karen Ward, president and CEO of WESSGRP, testifying today on behalf of the U.S. Women's Chamber of Commerce.

Access to federal contracts is vital for the continued growth and vitality of American small businesses. Yet, in 2014, there were 36,000 fewer small business government suppliers than there were in 2008. And between 2014 and 2015, small business awards decreased 20 billion. In this environment, decline in federal spending and decline in government suppliers, it is undoubtedly more important to ensure transparency in contracting and that the mandatory goal of maximum practical opportunity for small business concerns is being met government-wide.

Prior to 2008, annual small business procurement reports on federal procurement provided more detailed, important information than they do today. But in 2008, these reports were stripped down to nothing more than an aggregated list of total amounts spent by agency. The current SBA goaling and federal acquisition reports are the antithesis of transparency. I ask that Congress act to require the SBA to restore the goaling and federal procurement re-

port format to include the in-depth data and analysis as was present prior to 2008.

Inappropriate use of grandfathering is causing billions of dollars in awards to large businesses to be reported as part of small business goal achievement as federal agencies attribute awards to small businesses. Even when the business, as acquired by a large firm, is no longer qualifying for small business goaling.

federal regulations require firms that qualify as small at the time of its initial offer may be considered small business for goaling purpose throughout the life of the contract. However, important exceptions apply. Within 30 days of a proved contract novation, a contractor must certify its small business size to the procuring agency. And if the firm is no longer small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business goals. This is similarly true in the case of a merger or acquisition. There have been many instances where my firm has been forced to unjustly compete during RFPs against companies that were classified as a small originally, but if reclassified today, would no longer meet the small business size requirements.

I call upon Congress to require SBA to include details in annual procurement reports detailing the contract actions and dollars attributed to small business goaling with firms that are no longer small. Each year, the Small Business Administration carves out billions of dollars in federal contracts to be excluded from small business goaling. Most of these exclusions are without merit. The practice should immediately be terminated.

As a small business and lead for a small company prior to starting my own firm, I have seen and demonstrated that small companies are capable of performing work overseas. There can be no justification for claiming that American small businesses have limited chance to compete for awards pertaining to contracts performing outside the U.S., foreign sales, or American embassies. I ask Congress to act to require the SBA and these unwarranted exclusions from small business goaling and require that any exclusions be fully reported and justified annually.

The federal government is still not meeting its subcontracting goals, holding business prime contracts accountable for the subcontracting plans can help the government meet these goals. As a subcontract, I have seen issues associated with the ability to perform the work within the rates defined by large primes. Large primes will list the small business participating on the subcontractor plan and then provide payment rates for subcontractors that are not executable. Consequently, due to the inability for the small business contractors to fill these positions, the large primes ultimately fill those positions with their own personnel.

I ask Congress to require procurement center representatives to review all subcontracting plans, assuring they are compliant with the maximum practical opportunity for small business participation and empower the PCRs to deliver the acceptance of the prime contractor's subcontracting plans should these plans not meet these requirements.

Thank you for this opportunity to provide my testimony, and thank you for your efforts on behalf of the small business federal suppliers.

Chairman HANNA. Thank you, Ms. Ward.

Oh, we are going to have Colonel Gibson ask the first question.

Mr. GIBSON. Thanks, Mr. Chairman. And thanks for putting together this hearing. It has been very informative. I appreciate the testimony of the panelists here this morning with regard to issues that we are having on transparency, accurate reporting, and what might be done in terms of tweaking what we have on the books now, maybe tightening up some of the rulemaking timelines, or at least communicating our concern. I am hearing all that.

And then also, Ms. Ward, I appreciate these comments as far as small businesses that may not be small anymore. And I am curious to know, just as a clarification, you had mentioned inappropriate use of grandfathering. Is that what you meant? Or can you give an example of that just for my understanding?

Ms. WARD. So what I mean by that is there are so many times where there is a small business opportunity, and when you actually go after that opportunity, because they have been grandfathered in on an IDIQ, they are able to pursue that contract as a small. But in reality, they are no longer a small contracting firm. And so when you have companies like myself, which are truly small contracting firms, it is extremely hard to compete against those firms. And on top of that, you have got these numbers which show how small businesses have a number of opportunities by percentage of what is allocated for federal contracting. And in reality, because the fact that these companies are no longer small or getting these awards, it is showing that those companies specifically have—the federal agency is meeting those small numbers, percentages, but in reality, they are really not. And so the number of opportunities for someone like myself and my company and others like me within the U.S. Women's Chamber of Commerce are decreasing.

Mr. GIBSON. That helps. Thank you. And thank you for your strong leadership.

Earlier in the testimony, and I think it was our expert from AGC, was suggesting recommendations to changes for the change order and claims process. I am curious to maybe put a finer point on that, any recommendations you have. And then also for the panel, anything they want to add on that.

Mr. DELISLE. Excuse me. Yes, thank you.

Specifically with respect to the claims process, I can tell you that I think that an alternative dispute resolution process would be extremely helpful. Any sort of early detection and process that would allow the parties, require the parties, to sit down and work through these issues before you get involved in costly litigation would be most beneficial. And I think that is definitely something to consider as you consider some alternatives moving forward because the process that we are dealing with now is just simply not working.

Mr. GIBSON. And it would seem that that would make—I mean, candidly, that would make it harder because the smaller businesses have a harder time competing in terms of how much cost that would be in litigation, so it is a way of outflanking, if you will, small business.

Mr. DELISLE. Yes.

Mr. GIBSON. That is a fair point.

Any other panelist want to address that, or address anything on that score?

Well, thank you. Again, this has been very helpful in my read up before this and then hearing you today, so it is meaningful for us when you come here and you provide that testimony. So Chairman, thanks for your leadership on this, and I will yield back.

Chairman HANNA. Thank you.

I want to ask you something. I pretty well get all this. I have been in construction, myself, for about 30 years, and what do you think individually of the exclusion that these different governmental agencies make which automatically kick out large sums of money simply because I guess the premise is that small businesses are not capable of—and you mentioned this in your statement, Ms. Ward—of doing work that apparently is either too large or too difficult or too complicated. Somehow they arrive at these numbers and exclude, which is why we are here today, because when you do that, you automatically reduce the total dollars available. I mean, does anybody have an opinion about how they arrive at that? The whole process seems so arbitrary and capricious, and because it is rulemaking and rules and not clearly defined obligations, legal obligations, it seems like these agencies take advantage of that to pretty much make up their own rules as they go along.

We have some time here. I would just be interested in anybody's insights on that.

Mr. JANEWAY. Mr. Chairman, we have worked at a lot of different agencies within defense and intelligence and in general I would say most of them handle it in a somewhat uniform manner. They do a sources sought release where they try to find out what companies are out there that can bid on a particular scope of work. The challenge we find in those sources sought are hearing about them. Sometimes they are not always widely disseminated, even though they are supposed to be on CB, Federal Commerce Business Daily or the electronic version of it. CBO, I think it is. So they do release them. We do not always see them. Sometimes they are overly complex and complicated in how you have to respond to them. They almost become a proposal in themselves in the format and the volumes of material that comes back. So it is a challenge to respond to those in the timeline you are looking for and with the complexity or detail that they are looking at.

Chairman HANNA. So somewhat of like a war of attrition the process creates by itself.

Mr. JANEWAY. Exactly. Exactly. I mean, you find most businesses, small companies out there going after—I hate to use this term but it really is a reality.

Chairman HANNA. Can you describe, you have taken people off of the workload that was productive, put them on something that was potentially beneficial but it fell apart?

Mr. JANEWAY. Yeah, there are very few small companies out there, even large companies now, that have people that are not on billable engagements. If they are not working, they are definitely working proposals. So it is actually lost revenue when you do that. Exactly.

Chairman HANNA. Ms. Ward?

Ms. WARD. I would agree with Mr. Janeway. That is the issue I have as well, and a lot of us small businesses, is that even with myself, I work on multiple different contracts, and there is really no one that is not billable within my organization at this particular point in time, so that I can remain competitive and keep the rates where I need to keep them so I can subcontract off of larger companies. But in the prior work that I have done working for other organizations, we were a small company and we were able to successfully do work in foreign countries and be able to succeed in providing those capabilities that they were looking for. And so I really, truly believe they need to open up those capabilities and give small businesses a chance to respond and go after those.

Chairman HANNA. And why do you think they do not do that?

Ms. WARD. You know, I think it comes down to the risks that they see. Right? I mean, typically, you are looking for the low risk, the ability to procure it and have an organization that they feel can—

Chairman HANNA. What you are really saying is the fact that you are a small business is almost evidence to them that there is risk associated for some bureaucrat someplace. It is easy for him to hire somebody big and proven than it is to take a chance on you?

Ms. WARD. Yes.

Chairman HANNA. Which would be, to me, an indication that we actually need laws rather than rules to help them facilitate and eliminate that anxiety, if you will.

Ms. WARD. Correct.

Chairman HANNA. Does that make sense to Ms. Grossman?

Ms. CROSSMAN. I think maybe I might come at it from a slightly different perspective, but from a purely analytical perspective, if people are not including dollars, that just changes the total amount of money available. So I think making people who say it is not small business, this cannot be done by a small business, I think they should have to include that revenue in the bigger number and make more things available on work that is not part of that available to small businesses.

Chairman HANNA. Do you agree, Mr. DeLisle?

Mr. DELISLE. I think it is challenging. I can tell you that from my personal experience, I do a lot of overseas work, and I specifically am dealing with an awful lot of construction contracts that were built in Afghanistan right now. And I will tell you that the Corps of Engineers, Department of Defense has eaten large companies alive in places like that. It is very difficult to successfully perform overseas, and in that particular environment, it was extremely challenging. Lakeshore TolTest is one known example of a company that simply did not make it. Very large company that performed a lot of work in Afghanistan and simply could not make it. So I can understand it from the government's perspective. Taking into consideration the risk involved in performing overseas, I can.

I would say, however, that there are certainly opportunities for small businesses abroad, perhaps more at the subcontracting level, and that that issue does, in fact, need to be looked at more closely in terms of allowing participation.

Chairman HANNA. So you would say then that if they kept better track of and allowed you to have transparency, which was one of your original points—

Mr. DELISLE. That is right.

Chairman HANNA.—that you could actually have a better measurement of the small businesses that are used, and you might even feel better about the whole process because you would know that they actually are being used, and whether or not they are successful. And if there are requirements, then you would know how to fit your company into that space.

Mr. DELISLE. And that is exactly the point. Yes. Yes, Mr. Chairman.

Ms. WARD. The agency that excludes the highest percentage of its dollars from its base does not do overseas contracting. So it is not all overseas—we are all talking about overseas dollars, but the Department of Transportation excludes all but 28 percent of its spend. That is not overseas contracting.

Chairman HANNA. But they all exclude substantial amounts. I mean, you cannot take that away.

Ms. WARD. Well, of the nine agencies that exclude the highest percentage of dollars all seem to get As on their scorecard from SBA.

Chairman HANNA. Which, we would argue, they should not get.

Mrs. Lawrence? Thank you.

Mrs. LAWRENCE. Thank you.

Ms. Crossman and Ms. Ward, while equally successful in terms of results, women and minority business owners report investing more time and money in seeking federal procurement opportunities and submit significantly more than the average small business contractor does. What major challenges do you see women and minority-owned business facing in order to win these contracts?

Ms. Ward? Do you need a moment? I can go to Ms. Crossman.

Ms. WARD. Yes, I do. Please.

Mrs. LAWRENCE. Ms. Crossman?

Ms. CROSSMAN. I think that the new rulings for women-owned small businesses, giving them, the contracting officers the ability to sole source to women-owned small businesses has been a great thing for all women-owned businesses. I think the interesting part of this is all going to be how and when and if the contracting officers will begin to use the new rulings. It is new, and contracting officers sometimes do not like change, so I think encouraging them to feel comfortable setting aside a sole source for an EDWSB. You know, as we have been looking at the sources sought that are coming out, and as we talked with contracting officers, we have been trying to spread the word, and we bring around the information provided by women impacting public policy and try to connect the contracting officers. So it is an education.

Mrs. LAWRENCE. So if I follow you, it is a tremendous amount of discretion that is given to the contracting officer, and so therefore, they can or cannot use this tool of sole sourcing?

Ms. CROSSMAN. Well, they have the opportunity to use it.

Mrs. LAWRENCE. Okay.

Ms. CROSSMAN. But choosing to use it because it is new, right, not a lot of people have used it so far. It is new. It is a risk.

Mrs. LAWRENCE. What is the risk?

Ms. CROSSMAN. Because it is a new ruling. How are people supposed to use this new ruling? The 8(a) sole source has been in play forever. The women-owned small business is new. So I think it is just sort of educating the contracting officers and spending time convincing them this is a good thing for them to do. And it is a plus for them and a plus for women-owned small businesses.

Mrs. LAWRENCE. That is good to hear.

Ms. Ward, have you put your thoughts together?

Ms. WARD. Thank you for giving me the time to think through it.

So I hear what you are saying, and I would agree. One of the issues though in talking to the contracting officers is that they have not been given policy that allows them to actually execute direct awards for EDWSB. And I have heard that through a number of them. I have participated in a lot of industry-type U.S. Women's Chamber of Commerce meetings where they bring a lot of large industry and agencies into the forum, and when we go around and we talk to them, they specifically say we do not have the rulings and the policy yet to put into place. I also deal with other contracting offices and small business advocates within the agencies and they say the same thing; that until they have policy within the DoD or within the federal government and the federal space, they cannot execute it because they have to have that policy which drives the actions that they take.

Additionally, one of the issues that I see is that there are a number of organizations—this may not be the right forum—but there is a number of organizations that classify themselves in EDWSB and they do not have the certifications associated with it. My company, for the little bit of money that I spend, I go to a third party because I do want to justify the fact that, yes, if I am classifying myself as an EDWSB, I am actually a EDWSB.

Mrs. LAWRENCE. Exactly.

Ms. WARD. And that is one of the issues that I am seeing. Because there is more than once I have bumped into other companies and had discussions with them, and they say they are an EDWSB, but in reality, they are not.

Mrs. LAWRENCE. I really appreciate your openness on that.

Mr. Chair, I just had another question for Mr. DeLisle. In 2014, the federal government awarded \$90 billion to small businesses. Despite spending such a considerable amount, a recent GAO report found that there was no single system currently in place that is designed to link small business contractors to prime contracts. What tools are necessary to help small businesses get those subcontracts? And second, how do we get the prime contractors to invest more resources in subcontracting contracts, opportunities?

Mr. DELISLE. I can tell you that based upon my own experience, how it is done many times now. There are organizations, the National 8(a) Association is one of them, and I do a lot of work for the National 8(a) Association. And they will host meet and greets on a fairly regular basis trying to put large prime contractors together with potential subcontracting partners, both for large contracts that may be solicited by the government, as well as set-aside contracts where a teaming arrangement could take place, small

business hiring large business. That is one way that it is done. I host them myself. As far as what government can do, it is a great question because right now there is a disconnect between the primes, or the large businesses I should say, and the small businesses, linking together, finding one another, to work together. And that is the biggest problem. I do not know if you can necessary issue legislation to force some sort of a system, maybe you could. Maybe you could require some sort of a meeting of some type at some point during the solicitation process and have the large businesses document the fact that, yes, well, we hosted a meet and greet of some kind, this is who we invited, and this is who attended. You could do that if you wanted to. Perhaps that is one solution that you may have. As it stands right now, companies are on their own. I have plenty of small businesses that I represent that actively solicit agencies that they are interested in working for, and that is what they do and they ask questions. Okay, well, who do you use on your big contracts? Who are they? Who is the contact person? That is how it is done oftentimes now.

Mrs. LAWRENCE. Thank you so much. I yield back my time. Thank you, Mr. Chairman.

Chairman HANNA. Ms. Velázquez?

Oh, I want to take a minute and congratulate you on your Sandy—

Ms. VELÁZQUEZ. Yes.

Chairman HANNA.—bill being passed Monday; right?

Ms. VELÁZQUEZ. Monday. So it is going to the president for his signature.

Chairman HANNA. Good for you. Congratulations.

Ms. VELÁZQUEZ. Yes. Thank you. Yes.

Mr. DeLisle, you stated in your testimony that by removing the exclusions to the small business goal, agencies will look to the construction industry to make up the difference in their goals. What can we do to ensure that agencies are not relying on one industry for their goals and are looking to expand small business participation throughout all sectors?

Mr. DELISLE. The construction industry, I think simply by its nature and the fact that you have so many different levels of contracting that typically take place. It ends up being a place, which is not a bad thing, where many, many smaller contractors can perform and succeed. The problem is that I do not believe, AGC does not believe and is concerned that other industries—take manufacturing for one example—will not shoulder a fair amount of the subcontracting load, if you will, and participate at the same levels. I think what you need is going back to the reporting and transparency issues that we have discussed earlier, we need more information. There has to be an industry-by-industry review of what is happening and an understanding from the bottom, or from the top down to the bottom, who is participating. And that gets back to my earlier testimony where under the National Defense Authorization Act of 2014, if we can move that along, I think you will get much of that information and then be able to make a determination as to what the appropriate levels are and where the participation level should be.

Ms. VELÁZQUEZ. Okay, thank you.

Ms. Ward, you noted in your testimony that in a merger, acquisition, or other contract innovation, small businesses are required to recertify their size status. Yet, we have continued to see dollars that are counted towards the small business goal going to large businesses as a result of such acquisitions. Why do you think this is the case? Are businesses gaming the system and not recertifying when they are supposed to? Or is the information just not being reported correctly?

Ms. WARD. The reason I think that is the case is that if I get awarded an IDIQ, in the time I am awarded that IDIQ, I am a small business, but over time I am very successful and I am no longer a small business, but I am still on that IDIQ. I qualify as a small business on that IDIQ. So when I go after an opportunity—and some of these IDIQs are not just 5 years, they are 10 year IDIQs. And so when I go after an opportunity, I go after an opportunity as a small, but in reality, I am a multimillion dollar company. And I am way past the small thresholds. So what happens is companies like myself who are small and go on teams that are smaller, have a harder time in competing against those opportunities.

So if the federal government was required to basically set them up as if they are on longer a small, and that is not part of their small thresholds, then we would see a reality of how many contractors that are small contractors who are actually getting a percentage of the dollars allocated to the federal contracting.

Ms. VELAZQUEZ. I am just thinking in terms of legislative fixes. But I will come back to you.

Ms. Crossman, prior to award, large prime contractors are required to submit subcontracting plans for review. If a contracting officer finds them to be inadequate, he or she can decide to not award the contract to the business. In your experience, how often are contracts not awarded due to inadequate subcontracting plans?

Ms. CROSSMAN. From personal experience, I have not experienced that but we are also pretty particular about who we team with. But I do know of people where it has happened. It has not been my experience though.

Ms. VELAZQUEZ. So do you think that if this happened more often, would contractors be inclined to submit higher subcontracting goals?

Ms. CROSSMAN. Yes.

Ms. VELAZQUEZ. And Mr. Janeway, in FY2014, it was reported that small businesses received 33 percent of subcontracting dollars, yet we know that this number has been overinflated in the past due to inaccurate reporting. Based on your own experience, what about the process allowed this kind of misinformation to be reported?

Mr. JANEWAY. Ma'am, I am not sure I have enough detail on how the government actually reports that. All I can say is I see numbers that seem to be kind of spread all over the spectrum. You will see an association says that they did not meet their goals and then you will see something in the paper says an agency has declared success and they did meet their goals. So I do not have that insight.

Ms. VELÁZQUEZ. Ms. Ward, do you think that the federal agency, in this case SBA, has the authority to address the issue of small businesses growing into a big businesses and still applying or bidding for a contract that is intended to go to small businesses? How can we address that issue?

Ms. WARD. So just to restate what you are asking, essentially what you are asking is that if a small contractor wins an IDIQ and they are small at the time that they won it—

Ms. VELÁZQUEZ. Right.

Ms. WARD.—and essentially, as the IDIQ moves forward and they are no longer classified as a small, how does the SBA ensure that that large company, even though they are on an IDIQ, can still go after that award?

Ms. VELÁZQUEZ. Mm-hmm.

Ms. WARD. Unfortunately, in today's contracting world, that is exactly what they are given the ability to do. What I would hope is that if you could look at the numbers and show that those companies that are winning those awards are not small, it would actually show the reality of whether or not they are meeting the small business contracting goals. And if they are not meeting those goals, they would take hopefully other avenues to provide opportunities to the small companies.

Ms. VELÁZQUEZ. Thank you.

Chairman HANNA. Thank you.

It seems that the ability to be arbitrary for the bureaucracy to protect itself, to move towards larger companies is almost inherent in the process. Would you agree with that? That contracting officers would choose to use less latitude by hiring larger companies simply because it is easier. It defends their positions and the likelihood of failure is reduced. So would it be safe to say then that the rulemaking process at the end of the day cannot necessarily, unless they are hard and fast rules which you asked for, Ms. Ward, which are actually laws, and it is tracked differently, and more transparency, if we do not do that, we cannot fix this problem. Is that too far a reach on my part? Anyone?

Mr. JANEWAY. I would agree with you, sir. I think there is almost an inherent culture within acquisitions of risk aversion. Having been there, done that, you know, I remember us taking a risk where we had to, or we tried to buy down risk. But the culture today is very risk averse. It has always kind of been that way with contracting officers. I think it is the way they are trained to watch exactly how they do and who makes what decisions. But many times I think the entire, within the program management or execution side of it has also become risk averse. So it is much easier to hand a contract to a large defense integrator than break it off amongst—

Chairman HANNA. How big a factor is that? I mean, you see them effectively lower their goals by separating larger companies from small companies, so that is kind of an overt way, but what is the more subjective guess you might have about how that affects the ultimate awarding to small businesses?

Mr. JANEWAY. I do not know that I could actually put a number on it.

Chairman HANNA. It would be hard to do.

Mr. JANEWAY. Yeah.

Chairman HANNA. But you think it is a lot?

Mr. JANEWAY. Yeah. Yes, I do.

Chairman HANNA. Does everybody sort of agree, or not?

Mr. DELISLE. Yes, Chairman. I think one thing that may play into this also is the fact that you have a government contracting workforce that had been getting older, and you had many that retired and left. And you have younger contracting officers, perhaps becoming contracting officers a little bit sooner than they otherwise should, who are much less willing to take a risk than somebody who may have been more experienced and older, and thereby, willing, to take that risk. I mean, that is certainly something that I have seen at least some of as part of dealing with very young contracting officers who you think to yourself, "Well, gee, they are really making these decisions." Well, it is far easier for someone that fits that description to stick with the company that you know, or go with the larger company because there is less risk involved. There is less possibility that somebody is going to look at me that I made a mistake. So that could be playing into some of this as well.

Chairman HANNA. And all of that demands more transparency, so at least those larger companies are required to also go to work with smaller businesses.

Mr. DELISLE. That is right.

Chairman HANNA. If there are on further questions? No?

I want to thank you all for being here today. Given the hundreds of billions in federal contract dollars at stake each year, ensuring that small businesses have the opportunity to compete for federal prime and subcontracts is important. The goals are supposed to help us accomplish this, but currently, they are being used to paint a rosy picture rather than to capture reality, which we have heard today. We also need to make sure that subcontracting opportunities are real, and that subcontractors with a desire and a capacity are able to transition to become prime contractors.

I look forward to working with my colleagues on these issues, and I ask for unanimous consent that each member have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

This hearing is adjourned. And thank you again.

[Whereupon, at 11:00 a.m., the Subcommittee was adjourned.]

A P P E N D I X



Testimony of Anne Crossman

On behalf of

Women Impacting Public Policy

Submitted to the

House Small Business Committee
Subcommittee on Contracting and Workforce

“Continuing Challenges for Small Contractors”

November 18, 2015

Good morning. Chair Hanna, Ranking Member Takai and distinguished Members of the Subcommittee, thank you for the opportunity to testify.

My name is Anne Crossman. I am the Head Revolutionary at Completed Systems, a women-owned small business, based in Oakton, Virginia, dedicated to completing information technology projects that others have given up on. I am also President of Vertical Jobs, a company that provides experienced role players to law enforcement and government agencies.

I am here today representing Women Impacting Public Policy (WIPP) where I serve on its Leadership Advisory Council. WIPP is a national nonpartisan public policy organization advocating on behalf of its coalition of 4.7 million business women including 78 business organizations. WIPP plays a key role in developing women-owned businesses into successful federal government contractors through its Give Me 5 and ChallengeHER programs. Despite WIPP's efforts, access to federal contracts continues to be a challenge for women-owned businesses.

In my experience, two issues for small contractors are clarity of teaming relationships and length of time between Request for Proposal (RFP) response and contract award date. Many of the small business set-asides in today's environment require teaming and working with competitors as partners. Clarifying each team member's part and following through to ensure the subcontracting plan has been met takes time and focus. To a small business, time really is money and having to pay resources to be available not knowing when or if you will be performing the work is costly.

With regard to these issues, I know I am not alone. Contracting challenges confront WIPP members on a daily basis and act as barriers to women business owners succeeding in the federal market. WIPP's procurement committee continually updates women federal contractors on the changing landscape of procurement through communications and webinars.

Under your leadership, the Congress has enacted much needed changes, increasing access to federal contracts for all small businesses. Women entrepreneurs continue to struggle to access federal contracts at both the prime and subcontracting levels. While the federal government is yet to reach its 5% goal of prime contracts awarded to women, progress is being made. Since its inception in 2011, the size of the WOSB Procurement Program has tripled. We are heartened by Administrator Maria Contreras-Sweet's commitment to meeting this goal in FY16.

In October 2011, WIPP testified before this Subcommittee in a hearing entitled, "Subpar Subcontracting: Challenges for Small Business Contractors" on the issues small businesses face with respect to subcontracting.¹ Since that time, the Committee has made a number of improvements that we applaud, including allowing

¹ Bisceglie, Jennifer. Statement to the U.S. House, Small Business Committee, "Subpar Subcontracting: Challenges for Small Businesses Contractors," Hearing, October 6, 2011. Available at: http://smallbusiness.house.gov/uploadedfiles/bisceglie_testimony.pdf

women-owned small businesses to better partner with one another on federal contracts.

In the 2011 hearing, WIPP testified on confusion surrounding subcontracting requirements. The National Defense Authorization Act (NDAA) of 2013 addressed many of these fundamental problems by requiring the Small Business Administration (SBA) to clarify subcontracting requirements, including the amount that must be performed by both prime and subcontractor vendors. The SBA's proposed rule would update performance and subcontracting requirements for small business and socioeconomic program set-aside contracts.² We are hopeful that the final rule implementing these changes will be released soon.

More recently, WIPP supports an effort to increase accountability for agencies to meet their subcontracting goals as part of H.R. 1481, the Small Contractors Improve Competition Act of 2015, ultimately included in the FY16 NDAA. Incorporating subcontracting goals in Department of Defense procurement responsibilities is a positive step toward improving the subcontracting environment for small businesses.

In reviewing past testimony before this Committee on barriers facing women business owners in the federal market, we identified two continuing challenges. These are concerns with the subcontracting environment and issues with data collection and transparency. I will use my remaining time to focus on these two challenges.

Continuing Challenge #1: Subcontracting

Not having a relationship with the federal government is one of the most significant problems facing subcontractors. Without that relationship, subs are wholly dependent on the prime to remain in the federal contracting system. We believe subcontractors would benefit from participating in the broader contracting process. Many of the problems faced by subcontractors are symptoms of the underlying issue that subcontractors have no real relationship with the federal government.

When WIPP testified before this Subcommittee in 2011, we raised several questions about subcontracting plans: How are subcontracting plans being reviewed prior to award? How are subcontracting plans enforced? Should subcontractors have access to the plans?

WIPP members tell us that many of these questions have not yet been addressed. Four years later, we still do not know the true amount subcontracted to small businesses or whether subcontracting plans are actively enforced. We suggest that the federal government should require disclosure of the portion of the subcontracting plan to the subcontractor that is listed. At WIPP, we call this recommendation a "List Us, Use Us" policy, and we believe ensuring that subcontractors are not used solely to win awards but to do the work will benefit women entrepreneurs.

²Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 79 Fed. Reg. 77955 (December 29, 2014).

The government should require prime contractors to share this information with the subcontractor upon award. We understand the complexity of asking federal agencies to monitor compliance with the subcontracting plan, but it is necessary to ensure that prime contractors are acting in good faith when they amend subcontracting agreements.

WIPP has previously testified on the lack of information in the reporting of subcontracting plans. Since that time, the Government Accountability Office (GAO) has authored a study, “Linking Small Business Subcontractors to Prime Contracts Is Not Feasible Using Current Systems.”³ This 2014 study highlighted the same concerns that WIPP expressed in its 2011 testimony. The report found that linking subcontracting plans to prime contracts was “especially difficult” because the subcontracting plans do not specify to which contract they belong. GAO surveyed the four reporting systems—the Electronic Subcontract Reporting System, USASpending.gov, Federal Procurement Data System and Federal Funding Accountability and Transparency Act Subaward Reporting System and concluded that not one of the four had fully comprehensive data. In addition, GAO found that less than ten percent of contracts reported all of the required data.⁴

WIPP supports the effort to make this data reliable and uniformly accessible. In addition, it seems to us, that using four systems to report disparate data is an inefficient and unnecessary method to gather and display subcontracting data. WIPP believes two pieces of information should be reported and easily accessible: subcontracting opportunities available for a given contract and the extent to which those opportunities are actually being performed by a small business.

Continuing Challenge #2: Transparency in Federal Contracting Data

Data issues, however, are not limited to only subcontracting plans. WIPP believes that annual scorecards must be transparent and accurate, given the role these reports play in encouraging agencies to contract with small businesses, including women-owned small businesses. The annual scorecards, however, could be improved in three ways to better reflect small business contracting achievement government-wide.

First, the data reported in the scorecards needs improved accuracy. The SBA Office of Inspector General (SBA OIG) has cited accuracy in data reporting as a significant challenge for the agency.⁵ In a 2015 report, the SBA OIG found “widespread misreporting by procuring agencies...[and] many contract awards that were reported as having gone to small firms have actually been substantially per-

³ Government Accountability Office, *Linking Small Business Subcontractors to Prime Contracts Not Feasible Using Current Systems*, December 2014.

⁴ Government Accountability Office, *DATA TRANSPARENCY: Oversight Needed to Address Underreporting and Inconsistencies on Federal Award Website*, August 1, 2014.

⁵ Small Business Administration - Office of Inspector General, *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2016*, October 15, 2015.

formed by larger companies.”⁶ WIPP believes that accurate and timely data reporting will aid SBA in establishing Agency goals and ultimately ensure that small businesses, especially subcontractors, receive their share of contracting awards.

Second, these scorecards should measure the entirety of federal spending. Exclusions from the scorecard significantly change goal achievement progress. While SBA’s achievement of meeting the 23% was impressive, it would only have been 19.2% with the incorporation of all spending.⁷ SBA’s recent decision to include international contracts in these numbers is a good start.

Third, SBA scorecards would be enhanced by also measuring the number of firms winning contracts. Currently, the scorecards only measure dollars awarded to small businesses. While the amount awarded to small businesses is increasing, there are fewer firms participating in these contracts.⁸ As a result, contracting dollars are now concentrated in a smaller number of firms. WIPP was pleased to see this addressed in the FY16 NDAA.

In conclusion, women entrepreneurs consider the federal marketplace a key opportunity to grow their businesses. With more than ten million women business owners nationwide, competition for government opportunities among women innovators and entrepreneurs remains strong. For many, subcontracting is a staple of women business owners in the federal market. Ensuring that the rules and systems governing both prime and subcontractors are accurate and fair is of paramount importance. This Committee has always acted to support these pillars of WIPP’s procurement policy, and we know you will continue to do so.

Thank you for the opportunity to testify and I would be happy to answer any questions that you may have.

⁶*Id* at 6.

⁷Small Business Administration - Office of Advocacy, *Evaluation of the Small Business Procurement Goals Established in Section 15(g) of the Small Business Act*, June, 2014 at 13.

⁸Burton, Robert. Statement to the U.S. House Small Business Committee, “Contracting and Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals.” Hearing, March 27, 2015. Available at: <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=397854#sthash.hPCLkrG8.dpuf>

Statement of

Edward T. DeLisle
Cohen Seglias Pallas Greenhall & Furman PC

on behalf of

The Associated General Contractors of America

to the

U.S. House of Representatives

**Committee on Small Business' Subcommittee on Contracting
and Workforce**

For a hearing on

“Continuing Challenges for Small Contractors”

November 18, 2015



The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Statement of Edward T. DeLisle
Cohen Seglias Pallas Greenhall & Furman PC, Philadelphia, Pennsylvania
Subcommittee on Contracting and Workforce
Committee on Small Business
United States House of Representatives
November 18, 2015

Chairman Hanna, Ranking Member Takai and members of the committee, thank you for inviting me to testify on these important topics concerning federal small business contracting. My name is Ed DeLisle. I am a partner with the law firm of Cohen Seglias, where I co-chair our federal contracting group that is focused on federal construction. I regularly counsel federal contractors on a wide variety of small business issues, including advice on affiliation rules; mentor-protégé programs; small business and set-aside strategy and compliance (8(a) contracting, ANC, NAC, HUBZone, SDVOSB); small business subcontracting plan compliance; and small business size protests. Beginning next year, I will serve as Chair of the Federal Acquisition Regulation Committee for the Associated General Contractors of America ("AGC").

In this testimony, I will discuss:

- The role the construction industry plays in the federal small business program;
- The steps Congress—through this committee—has taken to encourage small business program transparency, including counting of lower tier small business subcontractors, and the U.S. Small Business Administration's (SBA) effort to include overseas contracts as part of the baseline used to rate agency performance against small business contracting goals; and
- The significant challenges small businesses face in the change order and claims processes when working for federal agencies.

I. The Role of the Construction Industry in the Federal Small Business Program

The construction industry has historically supported and provided opportunities for small businesses. Construction is usually accomplished under the leadership of a general, or prime, contractor. It is the job of the general contractor to integrate the work of the numerous trade and specialty contractors—acting as subcontractors—to complete the project. A significant construction project may have anywhere from 20 to 50—and in some instances more—trade and specialty contractors. These subcontractors are organized within the project delivery team in tiers so that each subcontractor can deliver its services in a highly integrated process. Small business subcontractors, operating at the appropriate tiers, are critical and essential to the success of construction projects and the construction industry as a whole. The industry cannot succeed without a large pool of qualified small business trade and specialty subcontractors.

This industry is proud of its efforts to include small businesses and allow small businesses to develop. However, instead of being rewarded for its efforts, agencies often over rely on the construction industry to shoulder the burden for other industries that have not encouraged small business involvement. Agencies try to meet substantial portions of their agency-wide goals by limiting competition to small businesses and their subsets in construction.

A consequence of this practice causes another disturbing trend: Massive growth in the percentage of small business subcontracting goals.¹ In some cases, we have seen the small business subcontracting goals exceed 50

¹ Before a federal agency sets aside a contract for only small business competition, the agency performs market research by conducting surveys and seeking responses from small businesses that would be interested in the contract. If two or more small businesses respond, the federal agency must set aside the contract for small businesses. When it comes to small business subcontracting, AGC is unaware of any market research conducted by federal agencies. AGC questions how federal agencies set their small business subcontracting goals when it appears

percent at the first tier of subcontracting on projects well in excess of the small business size standard.² Large prime contractors are usually able to meet the strict legal requirements to achieve these goals, but only through a combination of complicated project administration maneuvers and substantial use of lower-tier subcontracting to larger businesses. These techniques, while legally permissible, do not help most small business actually gain the experience necessary to grow and succeed as the federal small business program intends.

Rather than force unrealistic goals on construction projects, where an extremely high level of small business subcontracting is simply not feasible, the government should adapt its agency-wide subcontracting goals to be more consistent with what individual industry-wide markets can provide (i.e., construction, manufacturing and so forth). Counting lower tier small business subcontractors will help Congress and federal agencies make more informed decisions on how to do that, thereby ensuring that small businesses gain the experience they need to grow and succeed.

II. Transparency in the Federal Small Business Program

AGC believes that many within the federal contracting agencies focus on meeting statistical goals, rather than achieving the intent of the Small Business Act itself: encouragement and development of small business in an effort to preserve and expand upon the nation's security and economic well-being.³ Every administration—under either political party—trumpets the high grades of agency small business scorecards for meeting, or coming close to, their small business contracting goals. However, those grades are often based on unclear and incomplete data. Congress, through the leadership of this committee, has adopted, and is working on a number of reforms, to increase transparency within small business programs to help generate more accurate data to encourage federal agencies to meet the intent of the law, rather than to generate press.

This committee has undertaken a number of legislative initiatives to address small business transparency issues, including the agency scorecards. AGC thanks you for those efforts. For the purpose of my testimony

as though they do not conduct market research. The association fears that federal agencies arbitrarily set these subcontracting goals based on the edicts from senior bureaucrats in an effort to meet small business scorecard grade requirements, rather than the intent of the Small Business Act. In at least some instances, AGC finds that federal contracting officers simply copy and paste small business subcontracting goals from one contract to the next, regardless of the difference in the scope, value, or location of a project. The availability of qualified small business subcontractors significantly varies by location. The availability of small business subcontractors in Philadelphia, Pennsylvania is likely significantly different than that of those in Minot, North Dakota.

² As previously noted, some construction projects may involve 50 or more subcontractors. A number of those firms will likely be small business subcontractors. From that, one may reasonably question: why would it be difficult for prime contractors to achieve high small business subcontracting goals? The issue—as described in more detail in Section II.A. of this testimony—is that the government only counts subcontractors at the first tier of subcontracting towards small business goals. Generally speaking, when you have a construction project that requires 50 subcontractors or more, there could be three, four or more total tiers of subcontractors. In such an arrangement, the first tier of subcontracting may involve subcontracts well above \$15 million. The \$15 million dollar threshold is significant because that is the annual gross revenue threshold below which a subcontractor must be in order to be considered a small business. Usually, it is very difficult for a qualified small business subcontractor to perform work on one subcontract that may be greater than its entire annual gross revenue. Such a subcontract can put the small business subcontractor in a precarious position based on their limited internal capabilities and the availability of resources—staff and financial—that can also be committed to other ongoing subcontracts. As a result, meeting a high percentage subcontracting goal is can lead prime contractors to award subcontracts to small businesses that: (1) could default; or (2) more likely subcontract the lion's share of the work to a large business subcontractor that can perform the work, creating a pass-through situation.

³ See 15 U.S.C. § 631 (2015). See also PUBLIC CITIZEN, SLIGHTED: ACCOUNTING TRICKS CREATE FALSE IMPRESSION THAT SMALL BUSINESSES ARE GETTING THEIR SHARE OF FEDERAL PROCUREMENT MONEY, AND THE POLITICAL FACTORS THAT MIGHT BE AT PLAY (Taylor Lincoln ed. 2014) available at <http://www.citizen.org/documents/Small-business-contracting-report.pdf>

today, I would like to first discuss AGC's support for allowing non-small business prime contractors to count lower tier small business subcontractors toward small business subcontracting goals. Then, I would like to address AGC's concerns with the SBA's effort to include overseas contracts as part of the baseline used to rate agency performance against small business contracting goals.

A. Counting Lower Tier Small Business Subcontractors

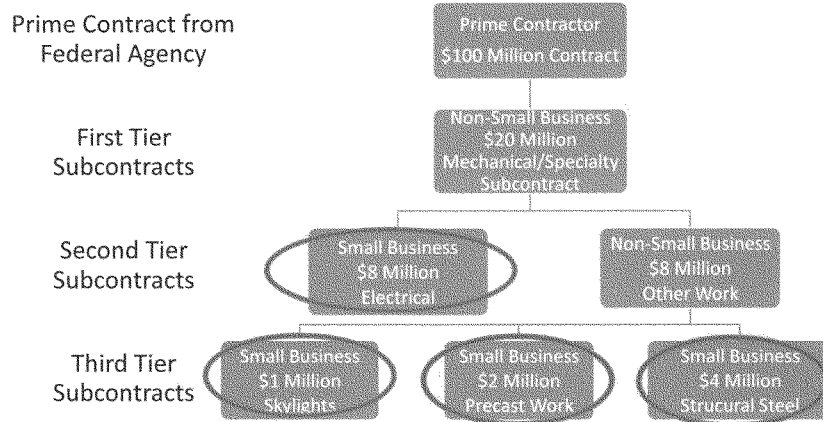
On December 26, 2013, the president signed the National Defense Authorization Act for Fiscal Year 2014 into law. Section 1614 of that law allows for the counting of lower tier small business subcontractors and is a provision that stems from a bipartisan bill—HR 2232 in the 113th Congress—introduced by former House Small Business Committee Chairman Sam Graves and cosponsored by Reps. Richard Hanna, Derek Kilmer and Gerald Connolly, among others.

The law can only take effect after the SBA and Federal Acquisition Regulation Council issue regulations to implement it. That rulemaking process was supposed to be completed 18 months after the legislation became law. Today, we are 23 months removed from when the law was enacted, and the SBA has only recently issued a proposed rule. Additionally, AGC has heard reports that the General Services Administration is not acting on addressing the electronic reporting systems changes necessary to implement such a reform. As a result, the current system of counting small business subcontractors remains in place. That system continues to fail to account for true small business participation.

i. How the Current System Fails to Account for True Small Business Participation

Current rules require set-asides for small business subcontractors, but prohibit prime contractors from truly accounting for the total amount of dollars flowing to small businesses. As it stands, if a business deemed large by SBA standards is included as a first tier subcontractor, a prime contractor is disqualified from reporting further dollars going to small businesses at lower tiers. As a result, and quite unfortunately, these current counting rules provide an incomplete picture of true small business participation. Putting the necessary reforms in place would help bring greater transparency to small business subcontracting goals as shown through the following example:

- An agency procures the construction of a \$100 million building. One of the first tier subcontracts is for all necessary mechanical and other specialty work, including electrical. The prime contractor awards that first tier subcontract, valued at approximately \$20 million, to a non-small business, as no qualified mechanical/specialty small businesses are available to manage that contract. That first tier small business contractor, in turn, subcontracts \$8 million in electrical work to a second tier small business.
- The current law prevents the prime contractor from counting the \$8 million second tier small business work, as that work is beyond the first tier. If the first tier subcontractors are non-small business contractors, as is the case here, the counting and reporting stops. That is true even though the electrical subcontractor is a small business. The counting problem is compounded if the first tier non-small business subcontractor then subcontracts another \$8 million to other non-small business that, in turn, subcontracts to small business specialty trades that provide work such as skylights (\$1 million), precast (\$2 million) and structural steel fabrication (\$4 million). As a result, another \$7 million subcontracted is not counted under the current rules.
- The diagram below depicts the example discussed above. Under the current rules, the small business contracts circled below are *not* counted towards a prime contractor's small business subcontracting goals. In this example, \$15 million in small business subcontracts would not be counted toward the subcontracting goal and the government would likely have no record of this degree of small business participation.



ii. The Benefit of Counting Small Business Subcontractor Participation at All Tiers

Allowing prime contractors to report small business subcontracting at all tiers would demonstrate true small business participation on a federal contract. Consequently, Congress and federal agencies could determine where small businesses are underrepresented and make informed improvements to the small business program.

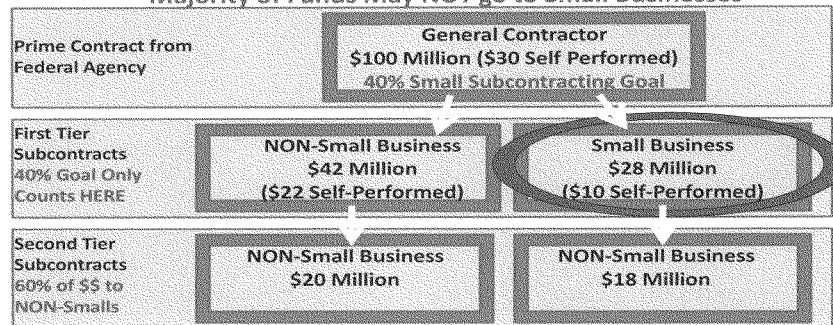
In addition, this reform would help ensure that small businesses actually gain the experience the program intends for them to gain through the enactment of these goals. However, as it stands, many prime contractors raise small business subcontractors that usually work at lower tiers to the first tier to help meet current small business subcontractor goals. Oftentimes, those small business subcontractors then join with non-small businesses, which actually perform a significant amount of the work and have the bonding capacity to guarantee it. As a result, much of the work experience the small business program intends for a small business subcontractor to gain is actually passed through to contractors that are other than small. Prime contractors are incentivized to do this because agency small business participation plans and subcontracting plans are an important element in the contract award process.

Small business participation at the subcontractor level is something agencies consider in their determination to make an award and the prime contractor's ability to meet those goals are included in past performance evaluations used in consideration for future federal work. By enabling prime contractors to count lower tier small business contractors toward small business goals, prime contractors can encourage qualified small business subcontractors to participate at a level they are most capable to perform and succeed by gaining the experience the federal small business program intended them to gain. The charts below further illustrate the benefits of this reform.

Current Law

GROWTH: PROVIDING FOR MORE SMALL BUSINESS PARTICIPATION

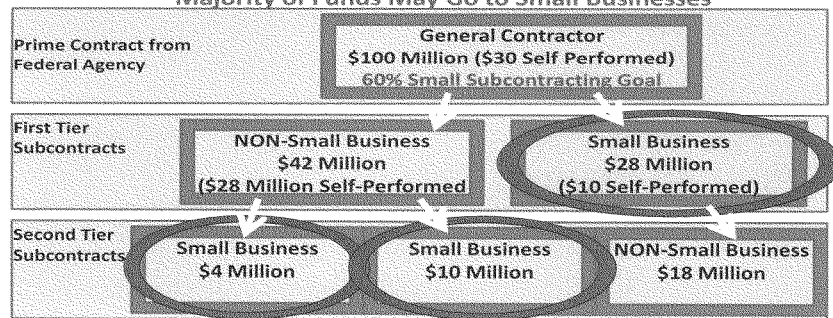
- General Contractor Goaled on Maximum Practicable Utilization of Small Business at ONLY 1st Tier
- NO Incentive to Drive Small Business \$\$ Below 1st Tier
- Majority of Funds May NOT go to Small Businesses



REFORM

GROWTH: PROVIDING FOR MORE SMALL BUSINESS PARTICIPATION

- General Contractor Goaled on Maximum Practicable Utilization of Small Business at ALL Tiers
- Incentive to Drive Small Business \$\$ at ALL Tiers
- Majority of Funds May Go to Small Businesses



B. Concerns with Overseas Contracts as part of the Baseline Used to Rate Agency Small Business Performance

AGC is very concerned with the SBA's effort to include overseas contracts as part of the baseline used to rate agency performance against small business contracting goals. As it stands about \$100 billion a year in federal contracts—including those contracts that support overseas projects—are not considered when an agency calculates small businesses' share of procurement dollars annually.⁴

When it comes to small business contracting, AGC firmly holds that government data used to measure an agency's small business "score" should be as accurate as reasonably possible. Nevertheless, AGC is aware of the unintended consequences of placing increased pressure on these agencies to meet their goals and receive a high score. Here, I would like to warn this committee of the potential impact of those unintended consequences when it comes to the inclusion of overseas contracts.

As previously noted, federal agencies often place significant reliance on construction contracts to meet their small business goals. By including overseas contracts in the baseline figure against which federal agencies measure their small business contracting participation, federal agency small business participation percentages will likely decrease, as American small construction businesses generally do not compete for prime contracts or subcontracts overseas.⁵ With an inherent inability to significantly raise small business contracting figures on overseas contracts, federal agencies will likely turn their attention to raising small business goals on domestic contracts. As a result, and in accordance with past trends, AGC believes that those goals will rise most precipitously on construction contracts. This could lead to unrealistic small business goals, allowing unqualified businesses to perform work on which they may default, pass through to non-small businesses, or require uncompetitive and higher payment. Such a situation would neither benefit small businesses, nor the taxpayers.

Let's come full circle and return to the issue I noted at the beginning of this discussion concerning statistics outweighing the Small Business Act's intent. No one likes to receive a bad grade, including a federal agency.⁶ And, as noted, AGC believes that the construction industry is likely to bear an unreasonable increase in small business goal requirements on its contracts through federal agencies. As such, AGC hopes that this committee will work with AGC to establish reasonable, industry-specific small business goals based on accurate, reliable data. Additionally, AGC hopes this committee will investigate sectors of the economy in which small business awards may be less than reasonably expected to help agencies more equitably meet their goals.

III. Challenges Small Businesses Face in the Change Order and Claims Processes

⁴ Jill R. Aitoro, *SBA to include Overseas Contracts in Rating Agencies*, WASH. BUS. J., May 15, 2015 available at http://www.bizjournals.com/washington/blog/fedbiz_daily/2015/05/sba-to-include-overseas-contracts-in-rating.html

⁵ Overseas construction contracts require significant financial and professional resources that often go beyond the realistic capability of a general contractor with annual gross revenues of \$36.5 million or subcontractor with annual gross revenues of \$15 million. AGC is unaware of any small construction contracting businesses competing for federal contracts abroad.

⁶ The exclusion of overseas contracts as part of the baseline used to rate federal agency small business contracting performance provides for fair competition between agencies. Remember, some agencies may have a significant number of overseas contracts, while others may have very few or none at all. For example, the Departments of Defense and State likely have a large number of overseas contracts, while the Department of the Interior may not. Including overseas contracts into the baseline will place agencies with many overseas contracts at a distinct disadvantage to those that do not have many or any of such contracts. The result would be an uneven playing field that would likely create a more confusing and less transparent grading system. That stated, in the event that SBA continues in its effort to include overseas contracts, AGC would urge members of this committee to allow for the reporting of two figures for purposes of the small business scorecards: (1) one figure that includes overseas contracts in the baseline; and (2) another figure that does not. Such a compromise would still allow for transparency, while also maintaining a level playing field between agencies.

The practicalities of working in the construction business and for the federal government are most challenging for small construction contracting businesses. The greatest challenge for such small businesses is dealing with their smaller economies of scale. Small businesses have fewer resources than larger businesses, and, consequently, may be ill-equipped to handle long downturns in the economy, the costs of complying with burdensome and endless federal regulation, and the expense of wading through bureaucratic federal agency processes. In this section, I would like to address the bureaucratic process known as contract modification—commonly referred to as the change order process—and the procedure when agreement on contract modifications during construction cannot be reached: the claims process.

A. Issues with Federal Agency Change Order Processes

A general contractor on a construction project is charged with managing subcontractors—whose numbers could range from anywhere from 2 to more than 50—based on a tight and detailed schedule. The general contractor must ensure that it and its subcontractors adhere to the requirements and specifications in the contract with a federal agency. However, sometimes the contract specifications or designs do not meet the practical needs of the project or the federal agency's project needs may change during construction. Such can happen when a contractor relies on a federal agency's account of the site conditions and the conditions on the ground are not as stated in the contract—i.e., contractor prepares to build a foundation, but during excavation, finds a previously unknown water well, or when a federal agency decides it needs more or fewer offices for an administrative building.

The problem for many small construction businesses is not that they cannot adjust to meet the changes required to complete the project as the federal agency desires. Rather, the issue is that many federal agencies take months and sometimes a year or more to issue a formal change order notice that a contractor should perform work to address the change—making the agency liable for payment for the work performed. Even after the decision to issue a change order is made, a small business contractor may not actually receive payment for that change order work for a considerable period of time. Because of schedule requirements under the contract, many small business construction contractors perform this change order work without waiting for the formal change order notice from the federal agency. Instead they may rely upon verbal promises from federal representatives that they will eventually get paid for the work. This is an incredibly risky proposition that, sometimes, leaves the small business unpaid for work it performed at the instruction of a federal representative without official notice. These problems were most recently publicized on the Department of Veterans Affairs' Aurora Hospital project outside Denver, Colorado.

On the VA Aurora Hospital project, the inability of the VA to process contract modifications left the general contractor and its subcontractors without payment for extended periods of time with severe consequences. For example, between September 2011 and September 2012, the VA stopped processing change orders tied to the southern clinic building then under construction.⁷ Small companies rely on prompt payments to meet payroll and expenses, often unable to cover those costs for very long.⁸ Many rely on bank loans and lines of credit to bridge the gap, but on the Aurora project some banks balked at letting small business clients rely on its money to continue work.⁹ According to the Colorado SBA, at least 33 small businesses were not paid for work in a timely fashion, and some were waiting more than a year after work was completed for payment.¹⁰ Of those 33

⁷ David Migoya & Mark Matthews, *Aurora VA Hospital Project Spooked Subcontractors, Causing Cost Hikes*, DENV. POST, May 15, 2015 available at http://www.denverpost.com/news/ci_28125325/aurora-va-hospital-project-spooked-subcontractors-causing-cost

⁸ *Id.*

⁹ *Id.*

¹⁰ Cathy Proctor, *SBA: Progress being made on Helping Unpaid VA Hospital Subcontractors*, DENV. BUS. J., April 4, 2013 available at <http://www.bizjournals.com/denver/news/2013/04/04/sba-urges-va-to-speed-payments-for.html>

companies, at least two filed for bankruptcy.¹¹ The prime contractor even paid subcontractors several million dollars out of its own pockets while waiting for payment from the VA, which was highly unusual.¹²

While the project in Aurora is a recent and, unfortunately, well-known example, problems with processing change orders happen in every federal construction agency on a regular basis. The problem is that those change order delays are happening on projects worth \$5 million, \$10 million and \$100 million, on which Congress does not ordinarily conduct oversight. The issue is that when the dollar amount is not high, and media attention is not existent, meaning that there's a lack of public outrage, the problems persist but go unnoticed by everyone except the small business that may have to close its doors.

As such, AGC strongly encourages this committee to conduct oversight on federal agency delays with issuing change orders on small business contracts. Through such oversight, we hope reform can be implemented that will help small businesses grow through federal contract work, not die.

B. Issues Facing Small Businesses with Claims against Federal Agencies

When small business contractors and federal agencies disagree as to when work is, or is not, covered under the construction contract, a contractor may file a claim for equitable adjustment, or a certified claim, against the government for payment. The claims process is often long, expensive and risky. Small businesses neither have the luxury of deep pockets to bear long periods of time without payment, nor can they generally handle such risk. The claims process generally takes years—sometimes 5 or more years—to conclude. During that time, small businesses may have to pay thousands of dollars in legal fees for the potential benefit of being paid pennies on the dollars they are owed.

There will always be legitimate discrepancies between a small business contractor and the government based on the terms of the contract. However, our concern is when the claims process is used unfairly—where the government fails to act in good faith—to the detriment of small businesses. Generally speaking, project funds come from a different budget account than the funds used to litigate and pay claims. Consequently, with project budgets tight, some federal contracting officers may tell contractors that there will be no change orders issued on a project. If there is an issue, the contractor will have to do the work and file a claim. The expense of litigating the claim, in the long run, may be more to the government and taxpayer than paying for the change order work. But, this situation is not something that will impact the contracting officer on the project or that project's budget. Additionally, some agencies will use the unlimited time and financial resources of the federal government to wait the small business out until it can no longer afford to continue with litigation and settles.

To provide further insight into this problem, AGC would like to work with this committee to investigate the trends in small construction business claims filed against federal agencies.

IV. Conclusion

Thank you again for inviting AGC to testify on these important topics to America's small businesses. We look forward to following up with you on several items, including:

- Implementing the lower tier small business counting reform in a timely fashion and in a practical and reasonable manner that will generate reliable data without being overly burdensome to contractors;
- Establishing reasonable, industry-specific small business goals based on accurate, reliable data;
- Investigating sectors of the economy in which small business awards may be less than reasonably expected to help agencies more equitably meet their goals;
- Reviewing the market research efforts, if any, that federal agencies use to set small business subcontractor goals;

¹¹ *Id.*

¹² *Id.*

- Conducting oversight on federal agency delays with issuing change orders on small business construction contracts; and
- Examining the trends in small construction business claims filed against federal agencies

Thank you for your time and consideration.

Testimony of Michael Janeway

President and CEO

APG Technologies, LLC

**House Small Business Committee Subcommittee on Contracting
and Workforce Hearing:**

“Continuing Challenges for Small Contractors”

November 18, 2015

Good morning. I would like to thank Chairman Hanna, Ranking Member Takai and the members of the Subcommittee on Contracting and Workforce for inviting me to testify today to discuss the continuing challenges facing small contractors and specifically how the federal government has not met its subcontracting goal in five years, even though they have continued to lower the goal each year.

My name is Mike Janeway, and I am the founding member, and President and CEO of a small business, APG Technologies, LLC headquartered in Potomac Falls, Virginia. My expertise is as a private business owner and as a retired U.S. Air Force Lt Colonel with experience working in the defense acquisition community as a program manager and program director of large command and control systems for both U.S. war fighters and our Middle East allies.

I founded APG Technologies in March 2008 as a Service Disabled Veteran Owned Small Business (SDVOSB) with the goal of providing high value ROI engineered designs and implementation to the Department of Defense and the various intelligence agencies of the U.S. federal government. We have approximately 30 employees spread across operating locations in the Washington DC area; Dayton, Ohio; Denver, Colorado; Colorado Springs, Colorado; Dallas, Texas; and at times various locations in California, Florida, Kentucky, and New York. Our company has successfully delivered and supported a variety of programs and missions used in the war on terror.

Having stayed true to our mission of providing high value data management solutions we have grown slowly, yet we maintain an excellent reputation in our market. Since our engineering deliverables typically center around components of much larger developments, most of our work is awarded as a subcontractor to much larger prime contractors. Our experience includes teaming with many of the large companies that typically bid on defense and intelligence contracts, including many of their operating locations across the U.S.

Federal procurement is not just of singular importance to many small businesses—small-business participation is crucial to a healthy and competitive federal procurement process. Small businesses provide high-quality goods and services to federal-contracting agencies and infuse the federal procurement system with much-needed competition. In turn, the federal government invests in the most-dynamic and innovative sector of the U.S. economy.

More than 30 years ago, Congress set a goal of having a certain portion of all federal contracting dollars go to small businesses and established sub-goals for small businesses owned by women, socially and economically disadvantaged individuals and service-disabled veterans, and for small businesses in Historically Underutilized Business Zones (HubZones). The current government-wide goal for small businesses' share of contracting dollars is 23 percent. However, every year since 2006, the federal government has missed the 23 percent small business goal and all but one of the sub-goals.

Small firms accounted for 63 percent of the net new jobs created between 1993 and mid-2013 (or 14.3 million of the 22.9 million net new jobs). Small firms in the 20–499 employee category led job creation. This unrivaled success has been achieved with less than adequate governmental support, however. Although small businesses comprise 99.7 percent of all employer firms in the U.S., employ half of all private sector employees, and are responsible for more than 50 percent of the country's private, non-farm gross domestic product, they only receive a fraction of federal contracting dollars and a tiny sliver of federal research and development investment. In fact, in fiscal year 2012, only 22.3 percent of all contracting dollars went to small business. When small businesses are excluded from federal contracts, the federal government, American taxpayers and the nation's economy lose out.

Subcontracting is an important avenue for small businesses to gain entry to the federal marketplace when they lack the capacity to compete at the prime contractor level and can also serve as a stepping stone to receiving work as a prime contractor. According to past NSBA survey data of those small firms that provide goods and services to the federal government, 48 percent said they have performed subcontracting duties for the federal government. Among businesses that do perform subcontracting for the federal government, approximately 66 percent said that at most 20 percent of their firms' revenue is based on federal subcontracting.

Subcontracting plans, where large business prime contractors explain how they will tap the talents of small businesses to help them in performing the contract are the key tool agencies have to facilitate opportunities for small businesses as subcontractors. While statutory and administrative goals are intended to provide small businesses with significant subcontracting opportunities, a lack of attention, consequences, and systems continues to plague the program.

Unlike the small-business prime contract goal, the small-business subcontract goal is administratively rather than statutorily determined. Like small-business prime contracting, federal agencies set goals for the percentage of subcontracts that will be awarded by federal contractors to small businesses. To achieve these goals, the government requires many federal contractors to submit small-business subcontracting plans that outline how small businesses will participate in contract performance.

Too often we see subcontracting plans written only to address proposal goals with little to no follow through after the prime contract is awarded. With no enforcement by the federal government to hold prime contractors accountable subcontracting plans seldom match reality and goals are never met. The impact to a small business can be significant. APG Technologies and hundreds of others companies have experienced this same scenario where you enter into a teaming agreement in good faith, provide engineering and administrative talent at your own expense to develop a solution, hire recruiters to get a jump on recruiting the best talent, and may even pay an option to lease a larger office only to see the

prime contractor find some reason not to award the subcontract or to delay staffing.

This allows the U.S. Small Business Administration (SBA) to adjust the subcontracting goal based on what it perceives to be the real opportunities for subcontracting. However, while SBA has steadily decreased the subcontracting goals from 36 percent to 34 percent over the last five years, subcontracting achievements have fallen from 35 percent to 33 percent. Each time SBA decrease the goals, agencies manage to subcontract less with small businesses. This results in real losses to small businesses.

In the Small Business Procurement Scorecard—which measures each agency’s progress in meeting their small business and socio-economic prime contracting and subcontracting goals and provide accurate and transparent contracting data—published annually by the SBA, the agency reported the following subcontracting goals and achievement for FY 2013:

Small Business Concern	Subcontracting Goal	Subcontracting Achievement
Small Business	36.00%	34.00%
Women Owned Small Business (WOSB)	5.00%	6.60%
Small Disadvantaged Business (SDB)	5.00%	6.70%
Service Disabled Veteran Owned Small Business (SDVOSB)	3.00%	1.70%
HUBZone	3.00%	1.20%

In fiscal year (FY) 2013, small businesses received \$86.7 billion in subcontracts, which is just about \$5 billion less than they received in prime contracts. If federal agencies had met the then-goal of 36 percent, subcontract would have accounted for more dollars to small business than prime contracts. The fact that the goal keeps decreasing indicates that less and less is being provided to small subcontractors.

APG Technologies’ experience is that prime contractors will comply with requirements the federal government frequently measures and enforces. The opposite is also true in that prime contractors pay little attention to requirements not measured, validated, and enforced. For example, APG Technologies has been a subcontractor on a large contract for a military service intelligence agency where we run the data management, integration, and architecture teams. The agency goal for SDVOSB awards is three percent but they rarely achieve half that annual goal and have shown little interest in enforcement on a contract with scope we could easily fulfill. Despite only achieving half their subcontract goal of three percent the prime contractor repeatedly recruits and staffs their own employees rather than award us new work.

Recently, this same contract was re-competed and awarded to a new company which added us as a subcontractor. Under this new contract, from the same agency, for the same scope, some of the small-business goals were not listed and the prime contractor’s re-

sponse has been to cut APG Technologies' hours which has resulted in staff reductions.

Prime contractors on any contract with an estimated contract value exceeding \$650,000 that has subcontract possibilities are required to submit a subcontracting plan to the government that assigns both percentage and dollar value goals to these opportunities. The government monitors the prime's utilization of small businesses by reviewing this plan and reported achievements against the plan. The government's review of performance against the plans is further complicated by antiquated supporting technology that still has contractors submitting plans and reports to the contracting officer in paper format in some cases.

This further shows that the SBA's subcontracting goals are arbitrary. In an attempt to improve this process, the National Defense Authorization Act (NDAA) for FY 2013 required that:

Not later than 180 days after the date of the enactment of this part, the Administrator of the [SBA] shall review and revise the Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals and Achievements to the extent necessary to ensure that ... agency subcontracting goals are established on the basis of realistically achievable improvements to levels of subcontracting rather than on the basis of an average of previous years' subcontracting performance.

However, nearly three years after the President signed the NDAA, SBA has not issued new subcontracting goal guidelines. Indeed, instead of implementing goals that reflect "achievable improvements" the SBA has decreased the subcontracting goal since 2013. This is not the solution.

According to past NSBA survey data, nearly 79 percent of the small businesses surveyed supported the idea that the federal government should provide greater oversight and protection for federal subcontractors. Therefore, I was especially pleased to see that the Senate Small Business and Entrepreneurship Committee passed both the *Small Business Subcontracting Transparency Act of 2015* (S. 2138) and the *Small Contractors Improve Competition Act of 2015* (S. 2139), which examines the difficulties in dealing with the federal procurement process, and addresses small business challenges in level the playing field and ensure fair competition in government contracting.

I also appreciate all of the work by House Small Business Committee Chairman Steve Chabot on his *Small Contractors Improve Competition Act of 2015* (H.R. 1481), which would amend the Small Business Act and the FY 2013 NDAA, and is intended to increase the number of awards made to small businesses by addressing several perceived obstacles that inhibit opportunities to increase small-business participation in federal contracting. Especially crucial was Sec. 102 that dealt with subcontracting goals.

Currently, when considering whether senior agency executives are eligible for bonuses, agencies must look at whether they met the small-business prime contracting goals. However, agencies do not look at whether the agency is meeting its subcontracting goals.

As a consequence, the percentage of subcontract dollars awarded to small businesses has been falling, and is down 2.5 percent since 2010. With subcontracting being an important entry point for federal contractors, this provision holds senior agency officials accountable for meeting all the goals. I applaud these small-business contracting reforms being included into H.R. 1735, the *National Defense Authorization Act for 2016* (NDAA) and look forward to President Barack Obama signing NDAA into law in the coming days.

The solutions to these concerns should be statutory in law by requiring the SBA to return to the higher 36 percent goal, stop reducing subcontracting goals, and make the goals mandatory contracting requirements for all federal acquisitions with procedures and penalties for failure. Administratively, the Federal Acquisition Regulation (FAR) should be changed to make and allow the following:

1. Subcontracting plans should be contractually binding, compliant with SBA goals, and enforced by the federal contracting officers.
2. Contract Officers should quarterly measure a contractor's compliance with the subcontracting plan.
3. Contracts Officers should be authorized to penalize contracts not meeting their subcontracting plan through payment withholds and other penalties.

In short, the subcontracting plans should no longer just be words on paper to address a proposal requirement. It should be an executable management plan that is contractually binding under and which the prime contractor is measured and held accountable. The subcontracting plans requirements should be revised to increase small business subcontracting participation and enhance the electronic subcontracting reporting system to improve federal agency monitoring of prime contractor achievements against their subcontracting plans.

As small businesses struggle to compete for federal contracts and subcontracts, I appreciate this subcommittee examining whether legislative changes could better protect and promote businesses such as mine.

Mr. Chairman, thank you for the opportunity to provide you and your subcommittee with the insight of my company's experiences. If there is anything I can do to assist you or your subcommittee I am more than eager to serve.

Testimony of
Karen Ward, President and CEO
WESSGRP
on behalf of the
U.S. Women’s Chamber of Commerce

Before the House Small Business Committee
Subcommittee on Contracting and Workforce
for the Hearing
“Continuing Challenges for Small Contractors”
Wednesday, November 18, 2015, at 10:00 a.m.
Rayburn House Office Building, Room 2360

Chairman Hanna, Ranking Member Velazquez, members of the committee—thank you for this opportunity to provide testimony before the Subcommittee on Contracting and Workforce.

I am Karen Ward, President and CEO of WESSGRP. I am testifying today on behalf of the U.S. Women’s Chamber of Commerce. My firm, which is certified EDWOSB by the U.S. Women’s Chamber of Commerce, provides system engineering, cyber-security, database administration, software engineering and program management support to the federal government and commercial markets.

Access to federal contracts is vital for the continued growth and vitality of American small businesses, the people they employ and their communities. In today’s environment of declining federal spending and declining government suppliers, it is doubly important to ensure transparency in contracting and that the mandatory goal of *maximum practical opportunity* for small business concerns¹ is being met government wide through direct small business prime contracts and subcontracting with small business.

Facts:

¹ See 15 U.S.C. 644§ 15(g)(1)(B): Achievement of Government Goals, <http://goo.gl/Fq268c>—Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Small Business Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Governmentwide prime contract goal established by the President pursuant to this paragraph.

- In FY2014 there were 36,000 fewer small business government suppliers than there were in FY2008.²
- Small business awards were \$23.6B less in FY 2015 than they were in FY 2010—including a large contraction of \$20B between FY2014 and FY2015 alone.³
- Annual SBA goaling reports or procurement scorecards do not tell us how many new suppliers are securing awards each year or how many suppliers are lost or acquired. Nor do they report the acquisition vehicle used or the amount of competition.
- SBA goaling reports or procurement scorecards tell us nothing about the details of contracts and contractors by agency, buying center, region or NAICS. They tell us nothing about the number of small businesses receiving contracts by socioeconomic category or the number of actions broken into dollar size ranges.
- And, SBA goaling reports or procurement scorecards tell us nothing about the actions excluded from small business goals.

Annual Small Business and Federal Procurement Reports contain extremely limited information providing few insights into the details of how federal acquisitions and small business goals are being met.

Many on this committee may not know—prior to 2008, much of the informative data I just named as missing from SBA reports was included in an annual Federal Procurement Report.⁴ But, in January 2007, the Small Business Administration announced a sweeping, gutting change to the annual Small Business Procurement Scorecard.⁵ This change, along with the development of the Federal Procurement Data System—Next Generation, rendered the small business and federal procurement reports to be nothing more than a simple list of aggregated spending numbers. The current SBA goaling reports and federal acquisition reports are the antithesis of transparency.

I ask that Congress act to require the SBA to restore the goaling and federal procurement report format to include the in-depth data and analysis as was present prior to FY2008.

Inappropriate use of “grandfathering” is causing billions of dollars in awards to large businesses to be reported as part of small business goal achievement each year.

² See <https://www.fpds.gov/>, Unique Vendors Reports from FY 2008 and FY 2014. The Federal Procurement Data System—Next Generation reports there were 144,857 unique small business vendors during FY 2008 vs. 108,762 unique small business vendors during FY 2014.

³ See <https://www.fpds.gov/>, Small Business Goaling Reports

⁴ FY 2007 Federal Procurement Report. Section 1: Total Federal Views - <https://goo.gl/LBUPDQ>, Section 2: Geographic Views - <https://goo.gl/acCBd4>, Section 3: Agency Views - <https://goo.gl/bmFktt>.

⁵ Letter from Fay Ott, Associate Administrator for Government Contracting and Business Development to the Directors of the Offices of Small and Disadvantaged Business Utilization, Re: Small Business Procurement Scorecard Guidance for Fiscal year 2008, 1/10/07. https://www.sba.gov/sites/default/files/aboutsbaarticle/goals_revised_guidelines.pdf

Federal agencies may be incorrectly attributing billions of dollars in awards annually as awards to small business—even when the business has been acquired by a large business and no longer qualifies for small business goaling.

13 C.F.R. 121.404(g)(1 and 2) states, a concern that represents itself as a small business qualifies and qualifies as small at the time of its initial offer...(and) is considered to be a small business through the life of the contract.

However the following important exceptions apply:

“(1) Within 30 days of an approved contract novation, a contractor must recertify its small business size to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.”

And, “(2)(i) In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.”⁶

However, in 2014, SBA Administration Maria Contreras-Sweet testified before the House Small Business Committee that, “We have a rule in place that says that once you get a contract with government, that you are given five years. And so if a large company acquires a small business, then it is grandfathered in for a number of years.”⁷ This statement clearly contradicts the regulations—and the objectives of our government.

Additionally, the government reports regarding small business contracting do not provide transparency as to how many contracts awarded to small companies are truly being performed by small companies over the lifecycle of the contract and on IDIQs at award. There have been many instances where RFPs my firm has competed with companies classified as small but, if reclassified today, would no longer meet the parameters that classify the company as a small company.

I call upon Congress to require the SBA to include details in the annual goaling and procurement reports about the contract actions and dollars attributed to small business goaling with firms that are no longer small.

⁶ See CFR Title 13: Business Credit and Assistance, Small Business Size Regulations, <http://www.ecfr.gov/cgi-bin/text-idx?SID=cb5092954b2d88cc6f0e0b5c902fb1c3&mc=true&node=se13.1.121.1404&rgn=div8>

⁷ Testimony of Small Business Administrator Maria Contreras-Sweet, U.S. House Committee on Small Business (Sept. 10, 2014), <https://goo.gl/nUXAMV>.

Exclusions to small business eligible actions rob small businesses of billions of dollars every year.

Each year, the Small Business Administration carves out billions of dollars in opportunities to be excluded from small business goaling. Most of these exclusions are without merit; the practice should be immediately terminated. In FY2014, \$73 billion of federal spending was not included as part of the “small business eligible” actions.⁸ Considering that, at a minimum, 23% of this spending should have been awarded to small businesses—small businesses lost over \$16 billion in opportunities in FY2014 alone.

For example, in FY2014 small businesses lost: \$12.4B from the Department of Defense, \$2.5B from the Department of State, \$2B from GSA. A public report prepared by the Department of the Army tells us, “If all the goaling exclusions were removed for FY14, Army’s base would grow by 15.37B and small business dollars would grow by \$.71B which would decrease (Army) small business achievement by 5.50%.”⁹

In 2001, the General Accounting Office directed the Small Business Administration to, “re-assess its rationale for making certain types of exclusions.”¹⁰ The GAO noted, “Since fiscal year 1998, SBA has directed FPDS to exclude certain types of contracts when calculating annual small business prime contract achievements.” However, “SBA’s rationale for making these exclusions is not documented.”

This report states that the reason for excluding foreign sales, contracts performed outside the United States, American embassies and certain actions by the Federal Highway Administration is because “small business have limited chance to compete for awards.” The report also finds SBA’s annual guidance on these exclusions “is confusing and incomplete.”

As a small company and a lead for small companies prior to starting my own firm, I have seen and demonstrated that small companies are capable of performing work overseas.

There can be no justification for claiming that American small businesses have limited chance to compete for awards pertaining to contracts performed outside of the U.S., foreign sales and American embassies—nor has the SBA provided evidentiary data to support this claim. Quite the contrary. In May 2015 the SBA Associate Administrator of Government Contracting stated: “We couldn’t find a justification to continue to exclude overseas contracts. So coming in 2016, we’re working with the Office of Federal Procurement Policy, Defense, USAID and State on including those contracts in the base.”

⁸Per <https://www.usaspending.gov>, the federal government spent \$445.6B in contract actions. Per <http://smallbusiness.data.gov>, the SBA attributed only \$367.2B as small business eligible actions. The SBA excluded \$78.4B in contract actions from small business eligible actions.

⁹The Impact of Small Business Exclusions on Army’s FY14 Performance, 4/13/15. <http://www.sellingtoarmy.info/content/impact-small-business-exclusions-army%E2%80%99s-fy14-performance>

¹⁰Small Business: More Transparency Needed in Prime Contract Goal Program, U.S. Government Accounting Office, August 2001. <http://www.gao.gov/assets/240/21854.pdf>

I ask that Congress act to require the SBA to end these unwarranted exclusions from small business goaling and require that any exclusions be fully reported and justified in small business goaling reports annually so that the entire small business community might see the billions of dollars of opportunity lost every year.

The federal government is still not meeting its subcontracting goals. Holding large business prime contractors accountable for their subcontracting plans can help the government meet these goals.

Subcontracting opportunities are very important to small business suppliers. As part of the Small Business Jobs Act of 2010, the SBA implemented rules that require prime contractors to ensure small business concerns are given the “maximum practicable opportunity” to participate in the performance of the work and conduct market research to identify small business subcontractors and suppliers through “all reasonable means.”¹¹

As a subcontractor, I have seen issues associated with the ability to perform the work within the rates defined by the large prime. A prime contractor may detail a number of subcontractor positions on their subcontracting plan—but, the actual dollars attributed to these subcontractors for the work to be performed is not executable by the subcontractors. On several subcontracting plans, where my company has provided resources and capabilities and where the list of small businesses participating are within the framework defined by the subcontractor requirements, the rates provided for the subcontractor are not executable. Consequently, due to the inability of the small business contractors to fill these positions, the large prime ultimately fills the position with their own personnel.

I believe it is important to place cornerstone of accountability at this juncture—to assure that prime contractors are adhering to “maximum practical opportunity” requirement. Federal code states that Procurement Center Representatives shall, “be an advocate for the maximum practical utilization of small business concerns in Federal contracting.”¹² As such, it is appropriate for PCR’s to delay the acceptance of prime contractor subcontracting plans should these plans not exhibit maximum practical small business participation.

I ask Congress to require Procurement Center Representatives to review all subcontracting plans to make sure these plans are assuring the “maximum practical opportunity” for small businesses to participate in the performance of the work and empower the PCRs to delay the acceptance of prime contractor subcontracting plans should these plans not meet this requirement.

¹¹See Federal Acquisition Regulations, 52.219-B Utilization of Small Business Concerns, https://www.acquisition.gov/sites/default/files/current/far/html/52_217_221.html#wp1136032

¹²See 15 U.S.C. 644 §15(1)(2)(H), Awards or contracts. <https://www.law.cornell.edu/uscode/text/15/644>

Thank you for this opportunity to provide testimony and thank you for your efforts on behalf of small business federal suppliers.

